No. 462.

Brief of Noer for D. & C.

Filed April 13, 1899.

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1898.

No. 462.

COLUMBUS CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
CRANE COMPANY,
Defendant in Error.

Writ of Error to United States Circuit Court for the Northern District of Illinois.

Motion to Dismiss Writ of Error, and Argument in support thereof; also, Argument in opposition to Petition for Certiorari.

RUSSELL M. WING,
CHARLES S. HOLT,
THOMAS L. CHADBOURNE, JR.,
ATTORNEYS FOR DEFENDANT IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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vs.
CRANE COMPANY,
Defendant in Error.

Writ of Error to United States Circuit Court for the Northern District of Illinois.

In error to Circuit Court of the United States for the Northern District of Illinois.

To Messrs. J. R. CUSTER and S. S. GREGORY, Attorneys for Plaintiff in Error.

GENTLEMEN: You will please take notice that on Monday, the 17th day of April, 1899, or as soon thereafter as counsel can be heard, we shall move the court to dismiss the writ of error for want of jurisdiction; a copy of such motion and of the brief and argument in support thereof is herewith served upon you.

RUSSELL M. WING,
CHARLES S. HOLT,
THOMAS L. CHADBOURNE, JR.,
Attorneys for Defendant in Error.

.d copy of above notice and of the motion, brief and argument therein referred to this ..5.th..... day of April, 1899.

J. R. CUSTER,
S. S. GREGORY,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States.

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No. 462.

COLUMBUS CONSTRUCTION COMPANY,
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vs.
CRANE COMPANY,
Defendant in Error.

Writ of Error to United States Circuit Court for the Northern District of Illinois.

Now comes Crane Company, defendant in error, by Russell M. Wing, Charles S. Holt and Thomas L. Chadbourne, Jr., its attorneys, and moves the Court to dismiss the above entitled writ of error for want of jurisdiction, and as ground for said motion shows that no question arising under the constitution of the United States is involved in said cause and that no other statutory ground exists for maintaining said writ of error.

RUSSELL M. WING,
CHARLES S. HOLT,
THOMAS L. CHADBOURNE, JR.,
Attorneys for Defendant in Error.

On Motion to Dismiss Writ of Error.

STATEMENT OF FACTS.

The entire record has been printed, and the necessity of special printing upon this motion is therefore avoided.

The Columbus Construction Company, plaintiff in error, a New Jersey corporation, brought suit in the United States Circuit Court for the Northern District of Illinois against Crane Company, defendant in error, an Illinois corporation. The declaration contains a number of counts, but for the purposes of this motion they are all substantially alike. They allege that the plaintiff and defendant entered into an agreement dated June 28, 1890, whereby the defendant agreed to sell and deliver and the plaintiff agreed to purchase two hundred and sixty miles of eight-inch wrought iron standard line pipe, to weigh not less than 27.48 pounds per lineal foot (together with certain pipe of other sizes not in controversy), which pipe should be "made from soft iron, free from blisters and other imperfections and guaranteed to stand a working line pressure of one thousand pounds to the square inch when proved and tested in line as hereinafter provided." A subsequent provision on this subject is that the defendant, vendor of the pipe, will pay to the plaintiff, purchaser, "all damage and expense of every kind which second party (plaintiff) shall sustain by reason of any defect or defects in the pipe delivered up to and including the time when said pipe is tested by second party under working pressure not in excess of one thousand pounds to the square inch and proved tight in the

line, which test shall be made with reasonable promptness." The agreement may be read in full at record pp. 22 to 26. Its other provisions have no bearing on the present discussion.

The declaration alleged for breach of this agreement, the delivery by the defendant of a portion of the pipe, and the failure of the part delivered to comply with the specifications and stand the tests prescribed in the agreement. In some of its counts the declaration alleged a rescission of the agreement and a tender back of the pipe delivered, but these averments, it is conceded, were not sustained by the evidence, and the case went to the jury upon the other counts of the declaration, which averred a retention of the pipe and asserted a claim for damages upon the warranty contained in the agreement. These damages consisted chiefly of money expended in bringing the pipe up to contract standard, including the expense of hauling, laying and testing a small number of miles, and procuring heavier collars or couplings to be substituted for those furnished by the defendant, both on the pipe laid and on that which had not been laid, the whole amounting to some $260,000.

The defendant filed a plea of the general issue with notice of special defenses and set off as permitted by Illinois practice. The substance of the defense was that the pipe delivered was in accordance with the contract, and the claim of set off was for a balance of purchase money for the part delivered (amounting to about $72,000 and interest) and for commissions on the remainder which the plaintiff had refused to receive, together with some items of special damage by reason of the refusal, in all about $130,000.

Upon the trial the plaintiff, after proving the execu-

tion of the agreement, offered evidence tending to show that about 106 miles of the eight-inch pipe were delivered, of which some twenty miles were laid in the ground at three points, and about twelve miles of this were tested (Rec., 153), and by the results of these tests, as well as by other evidence, the plaintiff sought to establish that the pipe delivered was not made in accordance with the specifications, and was not capable of standing the pressure of 1,000 pounds to the square inch, which the contract called for. This was followed by evidence tending to show that plaintiff, after becoming satisfied that the pipe was not sufficient to meet the requirements of the contract, adopted measures to remedy the difficulty, particularly by procuring a collar or coupling of nearly twice the weight of the coupling furnished by defendant and constructed in a peculiar manner to permit of lead calking at the joints; that this heavy coupling was applied to the pipe furnished by defendants, the old couplings being removed for the purpose; that some of the pipe delivered was still piled at the railway stations, some of it strung along in the fields, and about twenty miles, as has been stated, screwed together and laid in the ditch; that the substitution of collars took place wherever the pipe happened to be, and was made in a reasonably economical manner; that the pipe as thus equipped with new collars was tested up to 600 pounds with satisfactory results, and was then laid in line and has been in use ever since; and that the cost of the various operations detailed was in round numbers $257,000, which amount it was insisted represented in law the damages to which the plaintiff was entitled for the alleged breach by the defendant of its warranty contained in the contract.

The defendant offered evidence tending to contradict

that of the plaintiff as to the quality and strength of the pipe delivered, and tending to show that the pipe was made in accordance with the specifications and was sufficiently strong when properly and skillfully laid in line to stand the test of 1,000 pounds per square inch, and that its failure to stand the tests resulted not from defective quality or insufficient strength, but from careless and destructive handling and laying by the employes of the plaintiff. This was the principal issue before the jury, and by the verdict it was found that the pipe was such as the contract called for.

As bearing on the amount of damages, if it should be found that plaintiff was entitled to damages, defendant introduced evidence which was uncontradicted, showing that the plaintiff before entering upon the agreement in suit had bound itself by contract to a third party, the Indiana Natural Gas and Oil Company (spoken of in the record as the Indiana Company), to construct and deliver to the latter a pipe line for the transportation of natural gas from the Indiana gas fields to Chicago, and that the plaintiff's contract with the defendant was made for the purpose of enabling the plaintiff to fulfill its contract with the Indiana Company; so that the pipe was not purchased by the plaintiff for general use or for resale, but for a particular use, and was in fact applied to that use. Defendant offered uncontradicted evidence showing that the original agreement between the Columbus Company, plaintiff, and the Indiana Company, required the construction and delivery of a pipe line according to certain minute specifications, and capable of standing a working pressure not absolutely defined in the evidence, but apparently about 600 pounds to the square inch; that after the tests made upon the pipe fur-

nished by defendant had failed, and after the commencement of this suit, but before the new collars had been procured and substituted, the Columbus Company and the Indiana Company, under date of July 7, 1891, had voluntarily modified their agreement by reducing the requirements of the pipe line to be furnished by the Columbus Company to the Indiana Company from 600 or thereabouts to a working pressure of 300 pounds, and a test pressure of 400 pounds per square inch, with an allowed leakage of not exceeding ten per cent. of the contents of the line in twenty-four hours; and that the pipe line when completed was turned over to and accepted by the Indiana Company in pursuance of this modified agreement.

The defendant's contention was upon this evidence (and the court so instructed, as will hereafter be seen), that even if the pipe delivered was below the contract standard the plaintiff could not recover more than the damages which it had actually and necessarily sustained by the breach; and that any amounts which the plaintiff expended in bringing the pipe to an unnecessary degree of strength could not be recovered. The pipe having been purchased to fulfill a particular contract, and having been actually delivered and accepted in fulfillment of that contract, the plaintiff had no right, at defendant's expense, to make it any better or stronger than the provisions of that contract required. Therefore, as the jury were instructed, if the modified agreement between the plaintiff and the Indiana Company could be fulfilled, for example, with 600-pound pipe, it was not allowable for plaintiff unnecessarily to bring the pipe up to a 1,000-pound standard and then charge the defendant with the extra cost as a part of the damage sustained.

That the evidence in question was admissible for this

purpose, and that the rule of damages was as stated, had been settled by the Circuit Court of Appeals, reversing an earlier judgment in the case on this very ground, among others. *Crane Co.* v. *Columbus Construction Co.*, 73 Fed. Rep., 985.

All this, of course, raises no constitutional question. Whether the contract between the plaintiff and the Indiana Company, voluntarily modified by the parties to it, was admissible in evidence, and if so, what was its effect upon the rights of the parties to this suit, are questions wholly within the cognizance of the Circuit Court of Appeals.

But the modified agreement of July 7th, 1891, between the Columbus Company and the Indiana Company (which may be read at page 366 of the record) recites that whereas, in a suit of Jamieson *vs.* The Indiana Natural Gas and Oil Company and the Columbus Construction Company,

> "the Supreme Court of the State of Indiana has rendered a decision whereby it is declared that *under the statute of said state* the volume of gas which may be lawfully stored or transported in said state shall not exceed a maximum of 300 pounds' pressure to the square inch, and, whereas, by said decision the volume of gas which may be lawfully stored or transported in pipes has been greatly reduced, and thereby it has become necessary to modify and amend"

the specifications of the original agreement; therefore, the new specifications with the reduced pressure are hereby substituted for those originally attached to the contract.

It is the statute here referred to which is now attacked as unconstitutional, and that question is relied upon to give this court jurisdiction.

The statute, though not introduced in evidence, is set

forth in the bill of exceptions, and is found at record 367. It provides in substance that it shall be lawful to transport natural gas through pipes tested to at least 400 pounds pressure to the square inch; provided, that such gas shall not be transported through pipes at a pressure exceeding 300 pounds per square inch, nor otherwise than by the natural well pressure of the gas, and that no pumping or other artificial process shall be employed to increase the flow of gas from the wells or through the pipes. Penalties by fine and a remedy by injunction are prescribed.

It appears that the constitutionality of this act was challenged in the courts of Indiana by one Egbert Jamieson in a suit against the Indiana and Columbus Companies, based upon the very contract which is here involved. (*Jamieson* v. *Indiana Natural Gas & Oil Co., et al.,* 128 Ind., 555.) When the Indiana Supreme Court sustained the validity of the act the parties to that suit acquiesced in the decision and made the voluntary change in their agreement, which is above set forth; thereby, as we contend, waiving any question under the federal constitution, such as is now sought to be invoked.

The court, by its charge, submitted to the jury the questions:

First. Whether the pipe delivered was in accordance with the contract, placing the burden upon the plaintiff of proving that it was not.

Second. If it was not in accordance with the contract, then what damages the plaintiff was entitled to recover; in this connection referring to the modified agreement and the Indiana statute.

Third. If the pipe, on the contrary, was in accordance with the contract, then the court instructed that the de-

fendant was entitled to recover by way of set-off the purchase price for delivered pipe; and,

Fourth. Under certain conditions, the commission on the pipe not delivered and certain items of special damage.

A question is now raised upon the construction which the court gave to the contract under the first proposition; also about the instructions on the burden of proof under the third proposition; but neither of these involves any constitutional question. It will appear from a later analysis of the charge that under the first proposition the Indiana statute and the modified agreement were not in any way referred to. They were mentioned only under the second heading, viz: the amount of damages, if any.

The jury, however, by their verdict, awarded to the defendant something over $98,000; thereby necessarily determining that the plaintiff had failed upon the first branch of its case; that the second proposition as to the amount of plaintiff's damages had not been considered; and that the defendant had established its case under the third proposition, viz: that the pipe delivered was in accordance with the contract. The amount of the verdict nearly, though not exactly, fits the theory that it covered the balance of purchase money for pipe delivered, with interest, rejecting the defendant's claims for commission on the undelivered pipe and for other special damage. It is possible that a deduction of a few hundred dollars was made for minor defects in the delivered pipe; but this is conjectural, and unimportant here. Judgment was entered upon this verdict and writs of error were sued out both from the Circuit Court of Appeals and this court. The question raised by the pending motion to dismiss is whether the constitutionality of the Indiana statute is involved in the case.

The errors assigned on this subject are the thirteenth and fourteenth, attacking certain parts of the charge of the court (Rec., 507-8), and the twenty-ninth, upon the refusal of an instruction declaring the statute unconstitutional. (Rec., 514.)

BRIEF.

In support of the motion to dismiss we insist that the constitutionality of the Indiana statute is not involved in this case for the following reasons:

First. The statute and the modified Indiana contract were only submitted to the jury as bearing upon the amount of damages, if any, which the plaintiff might be entitled to recover. The jury, by their verdict, having found that the plaintiff was entitled to no damages at all, any error in the admission of evidence or in the instructions bearing on that subject was harmless.

In re Lennon, 150 U. S., 393, 399.
Carey v. *Houston, &c., Ry.,* 150 U. S., 170, 181.
L. & N. R. R. v. *Louisville,* 166 U. S., 709, 715.
Cavazos v. *Trevino,* 6 Wall., 773.
Philpot v. *Gruninger,* 14 Wall., 570.
C., M. & St. P. Ry. v. *Ross.,* 112 U. S., 377, 395.
L., N. A. & C. Ry. v. *Lynch,* 147 Ind., 165, 174.
Sanborn v. *Cole,* 63 Vt., 590.

Second. The Indiana-Columbus contract having been voluntarily modified by the parties without testing their rights under the Federal Constitution, they waived such rights, if any. It is immaterial whether the parties, in making this voluntary modification, were or were not in-

fluenced by a statute which they now contend to be invalid.

Mayor of New York v. *Manhattan Ry. Co.*, 143 N. Y., 1, 26.
Railroad Co. v. *Commissioners*, 98 U. S., 541.
Little v. *Bowers*, 134 U. S., 547.
Clark v. *Turnbull*, 47 N. J. Law, 765.
Rodswell v. *Butler* (Colo.) 17 L. R. A., 611.

ARGUMENT.

I.

ERROR NOT AFFECTING THE RESULT DOES NOT INVOLVE A CONSTITUTIONAL QUESTION ON APPEAL.

The law is so familiar as to be elementary that a constitutional question is not involved in a case within the meaning of the Act of 1891, unless its consideration and decision entered into the judgment rendered. The fact that a constitutional question may have been debated in the course of the trial is not the test. If it were, the ingenuity of counsel would easily inject such a question into every case and the jurisdiction and labors of this court would be greatly amplified.

The decisions on this precise point are comparatively few because the question did not exist before 1891. But the expressions of this court are clear and unmistakable.

> "In *Nishimura Ekiu* v. *United States*, 142 U. S., 651, jurisdiction of an appeal on habeas corpus directly from the Circuit Court was taken, as it was in *Horner* v. *United States*, 143 U. S., 570, upon the ground that the constitutionality of a law of the United States was drawn in question; and this would be so in any case that involves within the intent and meaning of the statute the construction or application

of the constitution of the United States, or where the constitution or law of a State was claimed to be in contravention of the constitution, *and the disposition of the case turned upon such constitution or law.* These would be cases within the classes enumerated in section 5 [of the Act of March 3rd, 1891]."

In re Lennon, 150 U. S., 393, 399.

"In order to hold this appeal maintainable as within * * * the fourth class in the enumeration of the statute, the construction or application of the constitution of the United States *must be involved as controlling,* although on appeal or error all other questions would be open to determination, if the inquiry were not rendered unnecessary by the ruling on that arising under the constitution."

Carey v. *Houston & Tex. Cent. Ry.,* 150 U. S., 170, 181.

"It is essential to the maintenance of jurisdiction, upon the ground of erroneous decision as to the validity of a state statute or a right under the constitution of the United States, that it should appear from the record that the validity of such statute was drawn in question as repugnant to the constitution and that the decision sustained its validity or that the right was specially set up or claimed and denied."

Louisville & Nashville R. R. v. *Louisville,* 166 U. S., 709, 715.

We are not unmindful of the decisions pointing out the difference between the jurisdiction of this court to review the decisions of state courts and its jurisdiction under section 5 of the Act of 1891. The former is subject to some restrictions which do not apply to the latter; as, for instance, although the state court has decided a federal question, still if its judgment can be supported on grounds not involving a federal question, this court will not take

jurisdiction. *Penn. Mutual Life Ins. Co.* v. *Austin,* 168 U. S., 695, and other cases.

So, also, if the state court has upheld the right claimed under the federal constitution or denied the validity of the state law as repugnant to the federal constitution, its decision cannot be reviewed here; but in cases originating in the federal courts and arising under section 5 of the Act of 1891, it is immaterial which way the lower court has ruled upon the constitutional question. *Holder* v. *Aultman, Miller & Co.,* 169 U. S., 81, 88.

But it remains true, and we suppose will hardly be disputed, that the constitutional question must have been decided by the trial court and must form at least an ingredient in the judgment rendered. If it appears that under the circumstances shown by the record a ruling of the trial court upon a constitutional question was in the end immaterial and did not affect the judgment one way or the other, then clearly there is nothing for this court to review.

To express the test in another form, if the error in ruling on the constitutional question was one which could not lead to the reversal of the judgment, the constitutional question is not involved in the case on appeal.

The fact that the Indiana statute is not really in the case at all, because the Indiana-Columbus contract was voluntarily modified by the parties, will be discussed under another head of the argument. For our present purpose we may assume that the statute itself was treated by the trial court as affecting the rights of the parties to this suit. It is to be noticed that the statute was not offered or received in evidence or read to the jury. (Rec., 352, 367.) It was referred to by counsel in stating his objection to the contract and exhibits (Rec., 367, at bottom),

but it never came to the attention of the jury except in the charge of the court in the passages referred to in the 13th and 14th assignments of error (Rec., 507, 508). In the first of these passages the court recited to the jury the substance of the Indiana statute prohibiting transportation of gas at a pressure above 300 pounds in pipe tested to 400 pounds, and the ensuing litigation to which the Columbus and Indiana Companies were parties; the decision of the Indiana Supreme Court in favor of the law and the voluntary modification of the agreement on July 7th, 1891, reducing the requirements of the line covered by the contract. The court then proceeds:

> "Now, in that regard, the plaintiff would not be justified in putting an expense into its work of redeeming its line from its alleged fault, or rather in repairing and putting the new collars upon the pipe or otherwise to establish the line, making expense to establish the line, to carry up to a pressure of one thousand pounds which it was not required to have in fact, and which was prohibited by law, from engaging in the transportation of gas at such a pressure."

The court then, in a passage omitted from the assignments of error, but shown at record page 481, explained to the jury that it was not only the right, but the duty, of the plaintiff to test the line when laid,

> "up to such pressure over and above the actual working pressure liable to be put upon it as would absolutely demonstrate, in so far as such test could accomplish this result, its capacity to prove tight under such working pressure as it was liable to be subjected to, and in making such preliminary tests to put on the pressure to such an amount in excess of the working pressure to be put on the line as should operate as a reasonable factor of safety in view of the inconvenience, risk and danger attendant upon the maintenance and operation of a leaky gas line at

high pressure, running through a populous region of country, such as was traversed by this pipe."

The court then adds, as quoted in the 14th assignment of errors:

> "So that although the plaintiff would not be authorized to incur an unnecessary expense, an expense in putting in provisions beyond the amount which would be reasonably necessary for that purpose, that is, to reach an arbitrary sum, it would still be authorized to make its tests and make provision which should give it a reasonable and proper factor of safety over and above the amount of pressure which would be permitted under that statute. But if the jury believe that *after the commencement of this case the plaintiff unreasonably and unnecessarily expended money in the purchase of new couplers and exchanged new couplers for the old, for the alleged purpose of constructing a line which would stand a pressure of one thousand pounds to the square inch* without regard to this question of the simple factor of safety, then the court instructs you that you should not find for the plaintiff *as damages* the sum of money so expended for that purpose."

The important thing to notice about all this is that it bears exclusively on the question of the amount of damages, if any, which the plaintiff would be entitled to recover if the jury should find that the pipe fell below the contract standard. When the jury found that question the other way, the whole question of amount and all evidence and instructions bearing upon that question disappeared from the case and are not involved in any way in the verdict and judgment.

That this court will not pass upon moot questions raised by assignments of error not affecting the result, has been stated so many times and in so many different forms that it would be easy to multiply the authorities. We con-

fine ourselves to two or three cases exactly in point as relating to error in instructions which were rendered immaterial by the findings on other points.

In *Cavazos* v. *Trevino,* 6 Wall., 773, it was disputed whether certain land in controversy was or was not included in a grant under which the plaintiff claimed title. The court charged the jury that even if the premises in controversy were included in that grant, the plaintiff's right might still be barred by proof of adverse possession. The jury found specially that the disputed premises were not included in the grant; whereupon this court disposed of the error assigned on the instructions about adverse possession, as follows (p. 785):

> "The finding of the jury that the line surveyed was the east line of the Espiritu Santo grant renders what was said by the court as to adverse possession and the presumption of a grant immaterial in the case. Right or wrong, those instructions could have done the plaintiff no injury and therefore constituted no ground for disturbing the verdict and judgment."

In *Philpot* v. *Gruninger,* 14 Wall., 570, on an issue as to the failure of consideration for a promissory note, the trial court instructed the jury to distinguish between the *motive* which led defendants to give the note and the *consideration* therefor, and so to inquire whether an agreement by the plaintiff to become a member of defendant's joint stock company was the consideration or only the motive for giving the note. The verdict and judgment were for the plaintiff. On appeal it was contended that this distinction between the motive and consideration was erroneous and was ground of reversal. The court, by STRONG, J., held that even if the distinction made by the lower court between motive and consideration was erroneous, and even though the agreement mentioned was a

part of the consideration for the note, still the error was not available because defendant's contention, even if established, would not tend to prove failure of consideration.

> "Gruninger's neglect or refusal to perform his agreement is not to be confounded with the agreement itself. The latter was the consideration, not its performance. He might be answerable for damages for non-performance, but his undertaking to perform would have been the price of the defendant's promise. That undertaking they still have, and with it the full consideration. * * * Were it then conceded as the defendants claim, the jury would not have been warranted in finding that the consideration of the note had failed."

To the same effect is *C., M. & St. P. Ry.* v. *Ross,* 112 U. S., 377, at 395, where the court says:

> "The charge on other points was immaterial. Whether erroneous or not, it could not have changed the result. The verdict could not have been otherwise than for the plaintiff. * * * We will not reverse the judgment below if error was committed in the charge which could not have affected the verdict."

An erroneous instruction which was not influential because the jury made no finding on the point involved therein, is not a ground for reversal.

Louisville N. A. & C. Ry. v. *Lynch,* 147 Ind., 165, 174; 34 L. R. A., 293.

In a recent case, the Supreme Court of Vermont says:

> "The defendant claimed that if there was a $50 note it was given for usury. The jury was instructed that if it was given for usury no recovery could be had upon it. This was correct. The jury was further instructed that if the note was given for usury, and the amounts indorsed upon it were paid

with an intention that they be so applied, the defendant could not recover them in this suit by receiving credit for them in ascertaining the general balance. If this was erroneous, no harm came from it, for the jury returned a verdict for all the notes, which they could not have done under the instructions given without finding that the note was not usurious. *Having found the note was not given for usury, they did not reach the matter in which the instruction complained of was given.*"

Sanborn v. *Cole,* 63 Vt., 590.

Even if the passages complained of stood alone, it would be impossible to give them any meaning that would affect the fundamental question of the plaintiff's right to recover. The whole scope of the passages is confined to denying the right of the plaintiff to put "an expense into *its work of redeeming its line from its alleged fault,* or rather in repairing and putting the new collars upon the pipe, or otherwise * * * making expense to establish the line to carry up to a pressure of 1,000 pounds." This assumes as its necessary foundation the existence of the "alleged fault" of the line. Indeed, the existence of the fault in the few miles laid and tested was conceded on both sides. The twelve miles of pipe that were tested not only proved incapable of sustaining a pressure of 1,000 pounds, but leaked outrageously under pressures below 100 pounds. The disputed question was, who was responsible for the leakage? If the jury had found that question in favor of the plaintiff, the next question for consideration would have been, how to "redeem the line from its alleged fault," and on that subject the language quoted from the charge would have been highly material. But the jury never reached that subject, because the previous question was decided the other way.

The record contains no exception, which can be thought to raise a constitutional question, to those parts of the charge that deal with this fundamental question of the right of recovery. Long before reaching the passages quoted in the 13th and 14th assignments of error, the court had dealt with and disposed of this question in terms which if erroneous are plainly within the cognizance of the Circuit Court of Appeals, and which, it is important here to notice, prevent any possible misconstruction of the later expressions now under discussion. This part of the charge, extending from page 470 to 480 should be read in full, but an outline of it may help to make the issue clear.

After dealing briefly with the question of burden of proof and preponderance of evidence, the court, at page 471, enters upon a definition of the rights and obligations of the parties under the contract.

> "It is the settled law of this case that the defendant by the terms of the contract became obligated as the seller of the pipe, and in addition to his character as agent for the plaintiff, he became *liable for any failure in the performance of the contract.*"

After reciting the substance of the agreement itself, and quoting in detail the first and seventh specifications from Exhibit B, which we have quoted above, the court, at page 472, proceeds:

> "By this contract the Crane Company, defendant, did not become obligated, did not promise or assume to furnish the defendant a tight line under the high pressure named in the contract, as it had no part, and took upon itself no obligation as to the duties of handling, caring for, screwing into line and laying the pipe after it had left the hands and care of the defendant. But it did assume and agree *to furnish pipe and collars* of material, strength, weight and threading *which would substantially conform to the specifications of the contract.* And it further agreed

and promised *that the pipe so furnished should be sufficient in those particulars when laid in line with due care and skill, to stand the pressure of 1,000 pounds of gas to the square inch, and to prove tight in line when tested. It was the quality and competency of the pipe and collars to this end and test that was thus warranted by the defendant,* and not a tight pipe line. * * * Each of these parties had a separate part in carrying out the purposes of this contract. The Crane Company was to furnish sufficient pipe, and properly care for the pipe to the delivery at railroad stations, and there its duty terminated so far as concerns the care of the pipe. From that point the duty of the plaintiff commenced. *To the end of obtaining the tight pipe line contemplated by the contract,* the plaintiff was required to exercise a high degree of care commensurate with the undertaking. This duty is not imposed by the express terms of the contract, but it arose from the fact that due care must be shown in the handling and laying before the defendant can be held chargeable for any failure at the tests."

After further defining the degree of care which the respective parties were bound to exercise in making and laying the pipe, the court, at page 474, proceeds:

"The provisions of the contract as to pipe proving tight in line must receive a reasonable construction, both with reference to the state of the art of pipe-making and of the piping of gas as known and existing at the date of the contract, and with regard to the *conditions which must be met by this line,* owing to its length, *the high pressure required,* and the need of economy and safety in conducting the gas to delivery points. There is evidence tending to show that no gas line had been made which was absolutely tight in line at even less pressure than this contract called for. The term 'tight in line,' as employed in this contract, must be interpreted as reasonably tight in line. * * * The question you have to consider upon the plaintiff's claim of breach of this contract is that of the quality of the eight inch line pipe delivered.

* * * Mere failure on the part of the plaintiff to pay in accordance with the terms of the contract for the pipe delivered from time to time, does not relieve the defendant from *its obligation assumed under this contract with the plaintiff in respect of the quality of the pipe already delivered.*"

After another short passage about delays in time of shipment occurs, at page 475, the following:

> "Therefore, gentlemen, your first and principal inquiry must be this: Considering all the testimony which bears upon the quality of the pipe delivered, does the testimony preponderate, is the stronger and better evidence in favor of the plaintiff's contention that the pipe was so generally defective in thread, taper and collars, in weight, thread and taper when received by the plaintiffs that the pipe and collars were incapable, as received, of making *a tight line in accordance with the contract as defined,* with reasonable inspection and rejection for obvious defects on the part of the plaintiff, and with such care on the part of the plaintiff in handling and laying as was practicable and as was called for by the definitions given."

The court then comments on the evidence produced on the part of plaintiff to show that the pipe was handled and laid with reasonable care, and on that subject says:

> "You should first examine that testimony to ascertain whether by itself it is satisfactory to your minds of exercise of the care called for to lay a pipe line, which should stand *the test called for by this contract.*" (P. 475.)

Coming, on page 476, to the contrary testimony offered by defendant, the court remarks:

> "The testimony of defendant tends to show the exercise of the utmost care in the manufacture of the pipe. That alone is not sufficient. That is important testimony for you to consider. The pipe was delivered upon the cars, was carried, and the defendant

> was responsible for it up to the delivery at the stations. That is, it was to carry the pipe upon the cars to the delivery points named by the plaintiff for receiving the pipe. If it came to those points *in a proper condition to meet the requirements of this contract,* of course, the defendant had discharged its liability fully. You should examine and consider carefully all this testimony as to the manufacture of the pipe to ascertain whether that has shown *a clear compliance with the requirements* in that regard."

After further comment on the conflicting direct evidence about the handling and laying the pipe, the court, on page 478, refers to other testimony as proper to be considered; among other things, the tests which were made of the twelve miles of pipe that was laid in line, and the leaks disclosed by those tests, both under low pressure at the beginning and "the subsequent tests which were made after the pumps came in, by which they could raise the pressure, are to be taken into consideration for the same purpose and in the same view." The three following pages are occupied with a discussion of certain letters written by the defendant and offered by the plaintiff as admissions in regard to the character and quality of the pipe.

It is after all this detailed and reiterated insistence upon the terms of the contract as fixing the quality of pipe which the plaintiff was entitled to require, that the court first touches upon the modified agreement between the Columbus and the Indiana companies. Certainly, it is clear beyond controversy that up to this point the original contract requirements have been insisted on. The contract itself has constantly been referred to as the standard of obligation, and there has been no hint of any reduction or modification in those requirements. The quality of pipe which the plaintiff was entitled to receive and the defendant was required to furnish, under the instructions of

the court, was the quality specified in the first and seventh clauses of Exhibit B, and the test of 1000 pounds is constantly referred to and dwelt upon. If the court will review the foregoing outline of the charge, and note especially the expressions that we have italicized, a connected impression will be obtained on this subject. It would take clear and unmistakable language later in the charge to make it possible that the jury could have been misled on this point. So far from containing this clear and unmistakable language, the charge, as we have seen, expressly limits the effect of the modified Indiana contract to the amount of damages. The court once or twice interrupts himself to touch upon a point overlooked, as at bottom of page 482, but except where the contrary is clearly indicated, the whole charge from the beginning of page 481 is devoted to the *amount of damage,* and the statement is:

> "If you find in favor of the plaintiff upon the issues as stated to you, that the fault was the fault of the defendant, then the plaintiff is entitled to recover such damages as were *reasonably incurred* by reason of such defects. The plaintiff has submitted in evidence * * * a statement * * * showing the various items which they claim to have expended in the effort to make the line, so far as they could make it, *what it should have been under the terms of the contract.*" (p. 484.)

And again:

> "If you find the plaintiff is entitled to recover, he is entitled to an allowance for such amount as he shows he *necessarily expended* because of breaches on the part of defendant." (p. 486.)

The references here are unmistakable to the expressions about unreasonable expenditure contained in the paragraphs relating to the Indiana statute and modified contract.

After all this, at page 487, the court takes up the defendant's counter-claim, the first item of which was $72,-843, for pipe delivered and not paid for. As to this the court says:

> *"If the pipe was such as called for by the contract,* then the defendant is entitled to recover that full amount against the plaintiff."

And further in the same paragraph:

> "If you find further that the pipe was *in accordance with the contract,* and if you believe from the evidence that the Crane Company was able, ready and willing at and after the 12th of February, 1891, to furnish and deliver * * * the balance of the pipe called for by its contract with Columbus Company, and *of the quality and character substantially in accordance with that contract,* * * * then the Crane Company is entitled to receive a commission of two and one-half per cent. upon the undelivered pipe at the contract price."

The same language is repeated with reference to another item of special damage included in defendant's counterclaim.

It must always be remembered that the modification of the Columbus-Indiana contract was made not only a year after the Crane contract was entered into, but after the entire controversy had arisen, which is involved in this suit, and even after the commencement of the suit itself. The statute in question was not passed until March, 1891, while the entire controversy between the parties to the present suit had developed and reached its final crisis in the previous February. (Rec., 285.) Under these circumstances, which were all before the jury, it would strain credulity beyond all reason to imagine that the jury could have been misled into supposing that the original rights and obligations of the Crane

and Columbus companies in respect to the performance of their contract were affected in any way by the statute and the modification of the Indiana contract. The attempts at performance by the Crane Company ceased five months before the adoption of the statute, and the jury could not fail to understand that the rights of the parties were then fixed. In the face of all this it seems hardly to admit of discussion that the charge of the court, so far as it defined the plaintiff's right of recovery, and the defendant's obligation, was based wholly on the original contract, and that the Indiana agreement and statute were mentioned only as bearing upon a branch of the case which the jury never reached in its deliberations.

The refusal of an instruction declaring the statute unconstitutional is covered by the same argument. If all the rulings of the trial court on the constitutional question had been the other way, the verdict and judgment could not have been different.

II.

THE FACT THAT THE COLUMBUS AND INDIANA COMPANIES, IN VOLUNTARILY MODIFYING THEIR AGREEMENT, WERE INFLUENCED BY A STATUTE WHICH THEY NOW INSIST IS UNCONSTITUTIONAL AND VOID, DOES NOT IMPORT INTO THE CASE THE QUESTION WHETHER THE STATUTE IS CONSTITUTIONAL.

The court has already observed that nothing in this case grows out of the *enforcement* of the Indiana statute, whose constitutionality is here attacked. So far as this record shows, the statute never has been enforced. When it was adopted the Columbus and Indiana companies attacked it in advance of any attempt to enforce it, and when the Supreme Court of Indiana declared it constitutional and valid, they voluntarily accepted it.

If the statute was invalid on the federal ground now urged, it was open to the parties to have that question settled by this court, whose word on the subject was the only final and authoritative utterance. Whether the then pending suit could have been carried directly to this court need not be discussed. It would have been perfectly simple to test the validity of the statute by *habeas corpus* in the federal courts whenever any attempt should be made to enforce it.

Moreover, even if the statute was valid, there was no need of changing the contract. The statute did not prevent or prohibit the construction of a line as strong as any one chose to make it, but only limited the pressure at which the line could be *operated* (not tested) in the transportation of gas within the state. Neither party was in danger of any of the penalties of the statute if they had gone on and fulfilled the contract as it stood for the construction of the line. The case would have been different if the statute had imposed new requirements in regard to the length of lines, etc., which the existing contract was insufficient to meet. A line strong enough for 1,000 pounds test and 600 pounds working pressure would certainly be strong enough for 400 pounds test and 300 pounds working pressure. If they had built the line as called for by the original contract, they could then have tested the validity of the statute by operating at a forbidden pressure and invoking the federal protection against the enforcement of the statutory penalty. If, then, the law were eventually held valid, it would have been easy to drop to the statutory pressure.

Instead of doing any of these things the parties chose to treat the statute as valid, and made a formal written declaration to that effect in the modifying agreement.

(Rec., 367.) This declaration is followed by a recital that "it has become necessary to modify and amend" the specifications of the original agreement. Why necessary? Not for the purpose of complying with the law, as we have shown. There was no legal necessity for such change. It would not be difficult to find a valid business argument for it. If the Indiana Company had agreed to purchase and pay for a line twice as heavy and expensive as it could use, business judgment might well dictate that this unnecessary expense should be saved. It is curious to find that that apparently was not the motive, for the modifying agreement makes no change in the price which the purchasing company is to pay to the construction company for its line. The same considerations originally provided for a 600 pounds line are retained when the strength of the line is reduced to 300 pounds.

But it is idle and unnecessary to speculate on the motives or the lack of motives for this modified agreement. The fact remains that the modification was voluntarily made, without testing in any federal court the federal question here relied upon and without even the pressure of a threat or of the possibility of enforcement of the statute by the Indiana authorities.

There should be no difficulty in deciding that the modification of the agreement was for all legal purposes an independent, voluntary act of the parties, with which the Indiana statute has no more to do than would, for example, a change in the market price of iron pipe or the discovery of some new and more economical method of storing and transporting gas. If, as a business proposition, it was cheaper and better for the gas company to obey the statute than to test its constitutionality by defying it, there is no doubt that it might rightfully do so; but that makes

a case not of *violation,* but of *waiver* of constitutional rights.

That such rights, like any others, may be waived, is well established by authority. A full and recent discussion of the subject is found in the opinion of Mr. Justice PECKHAM in *Mayor of New York* v. *Manhattan Ry. Co.,* 143 N. Y., 1, 26. In that case an elevated railway had been chartered by an act of 1867, which contained a provision that the company should pay to the city five per cent. of its net income "in such manner as the legislature may hereafter direct." An act of 1868, providing for the manner of such payment, was held to be clearly unconstitutional by reason of a defective title. Yet it was held that the corporation, by changing its motive power and doing some other things under the law of 1868, had waived the right to object to it for unconstitutionality. The court cites with approval the following expression from *Sentenis* v. *Ladew,* 140 N. Y., 466:

> "A party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right and no considerations of public morals are involved, *and having once done so, he cannot subsequently invoke its protection.*" (Italics in the opinion.)

Special stress is laid in the opinion upon the fact that the railway company or its predecessor had recognized the validity of the act of 1868 by paying in accordance with its terms for several years, and this was held to operate, not by way of technical estoppel, but as

> "a recognition by the company of the sufficiency of the directions, and a final and full consent to recognize the obligation to pay thereafter, and to put aside and waive the defense that the legislature had not yet spoken as provided for in the Act of 1867."

In other words, this was an election to treat the act as valid, notwithstanding a constitutional objection which the party might seasonably have invoked.

In the case at bar the written declaration of the Columbus and Indiana companies that the statute is valid, and their voluntary modification of their agreement in assumed compliance with the statute, is at least as formal an election and recognition as that in the New York case cited.

In civil actions, privileges which rise to the dignity of constitutional or statutory rights may be waived. So a rule of court is valid which provides that if neither party interposes a request for the constitutional privilege of oral argument until after the cause has been finally determined, he will be held to have waived his right thereto. *Rodswell* v. *Butler,* (Colo.) 17 L. R. A., 611.

Other lines of authority furnish accurate analogies Thus in *Railroad Company* v. *Commissioners,* 98 U. S., 541, the tax collectors in Nebraska were authorized by law to collect local taxes by levy upon personal property, and this without demand. The Union Pacific Railway, disputing its liability to taxation upon certain lands, nevertheless paid taxes thereon, filing with the payment a notice in writing protesting that the taxes were illegal and wrongfully assessed and levied, and were wholly unauthorized by law, and that suit would be instituted to recover back the money paid. The company had personal property in the county which might have been seized, but no attempt had been made to seize it, and no other notice than such as the law implies had been given that payment would be enforced in that way.

Afterward, upon a decision by this court that the lands were exempt from taxation, the company brought suit to

recover the amounts paid, and this court, by Mr. Chief Justice WAITE, had "no difficulty in answering the question," and denying the right of recovery. The court cites with approval the rule as stated by Chief Justice SHAW, in *Preston* v. *Boston,* 12 Pick., 14:

> "When, therefore, a party not liable to taxation is called upon peremptorily to pay upon such warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back as money had and received."

The court holds, however, that this rule

> "falls far short of what is required in this case. * * * Under such circumstances we cannot hold that the payment was compulsory in such a sense as to give a right to the present action."
>
> *Railroad Co.* v. *Commissioners,* 98 U. S., 545.

So in *Little* v. *Bowers,* 134 U. S., 547, the head note is as follows:

> "The voluntary payment of a municipal tax while a suit is pending in this court between the party taxed and the officers of the corporation to determine whether it was legally assessed, leaves no existing cause of action and requires the dismissal of the writ of error."

The federal question involved was whether certain assessments of taxes by the City of Elizabeth, N. J., impaired the obligation of a contract which the Central Railroad Company of New Jersey claimed to exist between it and the state, by virtue of a prior act of the state legislature, and therefore violated Section 10, Article 1 of the Constitution of the United States. After the case was submitted to this court it was made to appear by affidavit that the New Jersey legislature had passed a so-called

"Readjustment Act," by which commissioners were appointed to revise the amount of the taxes, and upon their finding, which was made final and conclusive on all persons, the taxes as readjusted became immediately due and collectible, and if not paid in six months the collector was authorized to sell the lands and give title to the purchaser. The Railroad Company, without contesting the validity of this readjustment act, paid its taxes as determined thereunder, and it was held that the payment was voluntary, and the rights claimed under the federal constitution were thereby waived. The court repeats the definition of involuntary payment from *Wabaunsee* v. *Walker,* 8 Kansas, 431, previously cited with approval in 97 U. S., 181, and in 98 U. S., 541, *supra,* as follows:

> "Where a party pays an irregular demand with a full knowledge of all the facts which render such demand irregular, without an immediate and urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure upon his person or property, such payment must be deemed voluntary and cannot be recovered back; and the fact that the party at the time of making the payment files a written protest does not make the payment involuntary."

After a further extended quotation from the Union Pacific case, in 98 U. S., *supra,* the court adds:

> "In no sense do we think the payment of the taxes in suit was made under duress. The payment under the circumstances above set forth was in the nature of a compromise, by which the city agreed to take, and the company agreed to pay a less sum than was originally assessed. *The effect of this action was to extinguish the controversy between the parties to this suit."*

An agreement to pay a claim, made by defendant arrested on lawful process as a condition of freedom from

imprisonment cannot be avoided on the ground of duress, even though it be shown that the claim was wholly unfounded.

Clark v. *Turnbull,* 47 N. J. Law, 265.

Multiplication of authorities cannot make the point clearer. The soundness of the argument can be tested by supposing that the Indiana Company had refused to accept the 400-pound line and had sued the Construction Company for breach of the original contract to build and deliver a 600-pound line. The Construction Company would have set up in defense the modification of that contract by which a 400-pound line was substituted; to which the Indiana Company would reply that the modified contract was ineffectual because based on an unconstitutional statute. Would such a contention involve the constitutionality of the statute within the meaning of the judiciary act? The question admits of but one reply. The Indiana statute is as completely irrelevant to the rights of the parties under their voluntary agreement as if it had never existed.

If that is so, the Indiana statute in the same way and for the same reason is completely irrelevant to the modified agreement when offered collaterally as bearing upon the rights of a third party, and its constitutionality is not, and cannot be involved in the present appeal.

Since the foregoing was prepared we have been favored with a copy of a petition for *certiorari* and an argument in support thereof on behalf of plaintiff in error. To avoid

multiplying papers we print our reply to this petition at the close of the present argument. Some expressions in the brief for petitioner seem to foreshadow the position which will be taken by counsel in answer to our motion to dismiss, and by touching shortly upon these in this place we may perhaps be spared the necessity of printing a further reply.

The argument and citations to show that the Indiana statute is unconstitutional are clearly out of place in this discussion. We have argued throughout upon the assumption that it is unconstitutional, since this court could not decide the contrary without taking jurisdiction of the case and thereby assuming the precise question in debate.

Two arguments are hinted at on page 24 as showing that the constitutional question is involved in this writ of error. The first is a general intimation that an examination of the charge of the court in connection with the evidence will show that the reference to the Indiana statute was "highly prejudicial to the plaintiff." On this subject we have nothing to add to the analysis of the charge contained in the foregoing argument. Our statement of the evidence, on a careful review, seems fully sufficient for an understanding of the charge in all its bearings; and we are positive that no substantial correction of that statement can be made from the record.

The second intimation is that the right of this court to hear the case follows from the fact that the trial court "considered and determined as material to the case a question arising under the federal constitution." This is the position anticipated and answered at the opening of our argument. The fact that a federal question has been under debate in the trial court and has been considered and passed upon by that court in instructing the jury does not

make the question material on appeal, as the authorities we have cited sufficiently show.

In any proper sense of the word the constitutional question was not *decided* in the court below, under the circumstances of this case. The charge to the jury and the rulings of the court upon the evidence are not the decision of the case. It takes a verdict of the jury, based upon the instructions and afterward approved by the trial court and reduced to judgment, to make a decision or determination. In this respect, as in others, the case at bar differs from *Chappell* v. *U. S.*, 160 U. S., 499, and *Holder* v. *Aultman, Miller & Co.*, 169 U. S., 81, which are cited on this point by counsel for plaintiff in error. In the *Chappell* case the constitutional question was raised by demurrer for want of jurisdiction, and was finally disposed of by an order overruling the demurrer and impaneling a jury to assess damages. In the *Holder* case a jury was waived and the court, by special finding, expressly ruled upon the constitutional question as the only basis of the judgment. In both those cases, therefore, the constitutional question not only was considered by the court in the course of the trial, but was finally determined and decided, and necessarily entered into the judgment rendered.

Nor is the argument in any way affected by the consideration that the court eventually may not have to decide any constitutional question. The *Holder* case settles that *if the constitutional question was involved in the judgment of the lower court*, the case may be reviewed here. So in the case at bar; if the trial court had charged the jury that the plaintiff's *right to recover* was limited by the statute of Indiana, there would be clear jurisdiction in this court to examine the case, and this jurisdiction would not be defeated by the discovery of other errors which might

lead to a reversal without any decision upon the constitutional question.

But all this remains a very different thing from saying that a constitutional question provisionally ruled upon by the lower court in the course of the trial, but not taken into consideration by the jury and not entering into the judgment which was finally rendered, and which could not have led to a different verdict and judgment if the trial court had ruled it the other way, is involved in the case on appeal.

The papers of plaintiff in error contain no hint of the answer that will be attempted to our second proposition in regard to the voluntary modification of the contract. We must therefore leave that subject for later discussion, if it shall seem necessary.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The argument in support of the petition for *certiorari* contains some academic discussion with which we do not seriously disagree. We shall not spend time in debating the power of this court to issue the writ in this case. It is well said by counsel that the existence of the power "does not establish the proposition that it ought to issue." We shall address ourselves first to a short statement of the attitude of this court, as indicated by its recorded utterances, on the general subject of issuing such writs; and, second, to a comparison of this case with the rule thus established.

The full and learned opinion of Mr. Justice BREWER, in *Forsyth* v. *Hammond,* 166 U. S., 506, makes other citation of authority superflous. Discussing the appellate powers of the courts as distributed by the Act of 1891, he notes the mischiefs that might have arisen "if an absolute finality of determination was given to the Courts of Appeal;" enumerating, (a) possible conflict of decision between the nine Courts of Appeal; (b) possible final judgment where the opinions of two judges of equal rank were on each side of the questions involved; (c) possible questions of public and national importance requiring consideration and determination by the supreme tribunal of the nation. And after pointing out that the power of review in this court was conferred in general terms and was comprehensive and unlimited, he proceeds:

> "Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the Courts of Appeal. So exercised, it might burden the docket of this court

> with cases which it was the intent of congress to terminate in the Courts of Appeal, and which, brought here, would simply prevent that promptness of decision which in all judicial actions is one of the elements of justice. So it has been that this court, while not doubting its power, has been chary of action in respect to *certioraries*. It has said: 'It is evident that it is solely questions of gravity and importance that Circuit Courts of Appeal should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the Court of Appeals is made final, to be certified, can be properly invoked. [Citing cases.] * * * We reaffirm in this case the propositions heretofore announced, to wit:* * * that while this power is coextensive with all possible necessities * * * it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the questions involved, the necessity of avoiding conflict between two or more courts of appeal or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demand such exercise."

The application of these principles is further illustrated by cases cited in the opinion, and by the facts in the case then under discussion; the reason for granting the writ in the latter case being "the unfortunate possibility of conflict and collision which might arise from these adverse decisions;" i. e., between the Supreme Court of Indiana and the Federal Circuit Court of Appeals.

It is plain that the granting or refusing of this writ does not depend upon the mere good nature of the court or the persistence of counsel. The discretion of the court is to be "sparingly exercised;" the presumption is always against the issuance of the writ; most of all in a case which is purely of private interest, which is pending in

the Court of Appeals, and which that court has not yet had opportunity to decide.

It will not do to urge the importance of the constitutional question as ground for granting the writ. If that question is in the case this court has jurisdiction in another way; if it is not in the case, then the questions involved are not more important or difficult than those in any other case of purely private concern. If this court, having the power at any stage of the proceedings *(Forsyth* v. *Hammond, supra*) to review the action of the Court of Appeals, declined to make such review after the Court of Appeals had reversed a judgment and ordered a peremptory verdict for defendant, because there had been no final action in the case by the Court of Appeals *(C. & N. W. Ry. Co.* v. *Osborne,* 146 U. S., 354), much more should the writ be denied where, as here, the Court of Appeals has had no opportunity to express itself at all.

Reference is made to *Pullman's Palace Car Co.* v. *Central Transportation Co.,* 171 U. S., 138, as "somewhat similar" to the present case. The statement of that case shows that the writ of *certiorari* was granted "on account of the peculiar circumstances" (171 U. S., 144). No opinion was filed in granting the writ, and we have therefore no official statement of the "peculiar circumstances" which influenced the court to allow it. An examination of the briefs filed on the petition discloses that the writ of error from this court was first sued out, and some months afterward a writ from the Court of Appeals; a motion to dismiss the latter writ was denied, but the Court of Appeals refused to proceed in the case until after this court had acted. In the meantime this court had reserved a motion to dismiss the writ pending here until a hearing on the merits; so that there was danger of a deadlock, and

a certainty of considerable delay. The application for *certiorari* was not opposed by the defendant in error. The answer to the petition opens with the statement that the respondent has no desire to avoid the consideration of the case in this court, but entreats the court to make its order one way or the other as speedily as possible. The answer then states respondent's version of the facts; comments upon the "extraordinary course" of the Pullman Company as leading to unnecessary delay; remarks upon the hardship resulting from the long pendency of the suit; and submits itself to the judgment of the court on the petition for the writ, without a word in opposition thereto, "only praying that the court may take such action as shall lead to the most speedy and final decision of this litigation."

Whatever may have been the reasons for allowing the writ there, it is no argument to say that because one peculiar case had been decided, therefore every other peculiar case should be decided the same way. The peculiarities of this case, as we shall attempt to show, are such as should lead to its decision in the ordinary course of judicial administration rather than by the use of the extraordinary writ that is here invoked.

The reasons suggested by counsel for the issuance of the writ are of two kinds. First, it is said this court cannot decide the motion to dismiss the writ of error pending here, without a full examination of the record, and that

> "in such case a writ of *certiorari* might be allowed, so that this court, having thus considered the record, might be in a position to pronounce judgment quite irrespective of the conclusion reached as to its jurisdiction in error." (Brief, 18.)

If this argument were well founded in fact, it would

still be dangerously near an appeal to the mere good nature or caprice of the court. The argument applies in principle, though not in detail, with equal force, to any case of a motion to dismiss a writ of error. No such motion is decided without giving this court more or less acquaintance with the record. If that fact makes it the duty of this court to decide the case on its merits and relieve the Circuit Court of Appeals of its consideration, the mere fact that in this case a writ of error is already pending in the Court of Appeals makes no difference in principle. In the other case the process would be, upon the dismissal of the writ of error by this court, to sue out a new writ from the Court of Appeals and then file a petition for *certiorari* here, on the ground

> "that this court having necessarily examined the whole record of the cause, ought not to be disabled from pronouncing such judgment as it deems appropriate as the result of such examination." (Brief, 19.)

In either case the purpose of congress to distribute the appellate jurisdiction of the federal courts would be frustrated; the limitations which this court has properly imposed upon its own exercise of the power would be set aside; the Court of Appeals would be relieved and this court burdened; and all because counsel for plaintiff in error has seen fit to bring to this court a controversy which by the hypothesis does not belong here. For, of course, if it does belong here, the whole discussion about *certiorari* is immaterial.

But it is startling to find counsel seriously asserting that such examination of the record as this court will have to make for the purpose of disposing of the motion to dismiss, involves "practically a thorough consideration of this writ of error on its merits." (Brief, 18.) It may

be that counsel for plaintiff in error intend to argue the whole case on its merits upon the motion to dismiss. It is very certain that we have not done so and that any decision on the merits of the case, based upon this examination, would be *ex parte*.

The errors assigned on the record are thirty-three in number, of which three, and only three, form the subject of discussion on the motion to dismiss. These are, as we have said, Nos. 13, 14 and 29. The subjects of the other assignments of error may be tabulated as follows:

Errors in charge as given: Nos. 1, 2, 15 and 17, burden of proof; 3, scope of obligation under contract; 4, 5, 6, 9 and 10, degree of care required from plaintiff in handling pipe; 7, construction of phrase, "tight in line," as employed in contract; 8, quality of pipe; 11 and 12, effect of certain letters in evidence; 16, minor and occasional defects not sufficient; 18, screw joints and lead joints; 19, defendant's commission on undelivered pipe; 20, special damage to Pittsburg Tube Co.

Plaintiff's requests refused: 21, effect of joint inspection; 22, effect of letters; 23, scope of obligation under contract; 24, effect of defects in manufacture; 25, defendant's right to recover for pipe delivered; 26, degree of care required from plaintiff; 27, necessity of uniform taper; 28, Indiana contract is collateral and irrelevant; 30, plaintiff's right to recover expenditures in repairing pipe.

Rulings on evidence: 31, admission of Columbus-Indiana contract. (No constitutional question stated in this assignment.) 32, exclusion of evidence about a certain test made in 1891; 33, admission of evidence of experiments made during progress of trial.

It would be a strange sort of consideration which this

court could give to these questions, as incidental to a motion to dismiss for want of jurisdiction. For a single illustration, the questions raised by assignments 28 and 31 upon the admission of the Indiana-Columbus contract (aside from the constitutional question) are precisely the same in this case as upon the former argument in the Court of Appeals. We have had the curiosity to examine the briefs filed in that court, and find that in four different briefs not less than seventy-one pages were devoted to the discussion of this single question. On the present motion to dismiss the writ of error our argument is silent on that subject, and counsel's reply can hardly be expected to cover both sides of the question. Yet it is gravely suggested that when this court has examined the record on the constitutional question alone, it will be "in a position to pronounce judgment" and ought to remove the case from the Court of Appeals on that ground!

The second line of argument in support of the petition for *certiorari* is that the case has been pending a long time and involves questions of "general interest and importance." Certain of these questions counsel seem disposed to argue in a preliminary way on this application for the writ. One of them is that just touched upon, with reference to the effect of the collateral Indiana-Columbus contract upon the rights of the parties; as to which we only remark that the use made of that contract by the trial court was not only in accordance with the ruling of the Court of Appeals in this case (as counsel expressly concede), but was supported by ample citation of authorities, which (as is not unusual in such cases) the defeated counsel see fit to consider inapplicable.

The other question suggested is upon the meaning and effect of the contract, and no doubt this is of considerable

interest to the parties, and to the lawyers who happen to be concerned in the case; but it is hard to imagine a question that lies farther away from the domain of public interest or which seems less likely to arise in the same form in any other case to the end of time. It is a question of the construction of a peculiar and unusual contract, on which it is not claimed that any contrariety of decision exists or is likely to arise; still less that it involves any public interests as between the state and federal jurisdictions.

The suggestion that this case should be removed from the consideration of the Circuit Court of Appeals because of its history, finds little support even in the statements of counsel for petitioner. The lower court (Judge BLODGETT presiding) in the first instance on demurrer construed the agreement as creating only the relation of principal and agent. The Court of Appeals, reversing this decision, held that the agreement imposed upon the defendant some of the liabilities of a vendor with warranty. Thereupon that question disappeared from the case. The subsequent trials have all been conducted on the basis of a liability as vendor with warranty, and that question is not in the present record.

At the first jury trial, before Judge GROSSCUP, there was a disagreement, which surely furnishes a slender argument in support of the petition for *certiorari.*

On the second trial, before Judge SEAMAN, there was a verdict for plaintiff, which was reversed by the Circuit Court of Appeals for errors of law, not on any point previously considered, but on questions then raised for the first time.

On the third trial (Judge SEAMAN again presiding),

which resulted in the present judgment, it does not seem to be disputed that the trial court followed the rulings of the Circuit Court of Appeals on the questions which that court had decided. The present writ of error, therefore, raises no question on which there is or ever has been any contrariety of ruling, except those upon which the Court of Appeals reversed the plaintiff's judgment, and those are in this record upon rulings by the trial court in harmony with that decision.

It thus appears that the real ground of anxiety to take this case away from the Circuit Court of Appeals and get it decided in the first instance by this court is the fact that the Court of Appeals has already settled the important questions in the case in favor of the defendant in error, and there is every reason to suppose that the same court would now pass upon the same questions in the same way.

Whether this attempt to dodge a court which in the orderly course of administration would almost certainly affirm the judgment, and to experiment with the extraordinary powers of this high tribunal in the hope of securing a different decision, ought to have been made, it is not for us to say. But we have no hesitation in affirming that it ought not to succeed, and being addressed to the sound judicial discretion of this court, we have every confidence that it will not succeed.

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